FARMERS' CO-OPERATIVE ASSOCIATIONS: THEIR LEGAL AND LEGISLATIVE ASPECTS[1]

No attempt has been made in this paper to touch upon all the subject-matter which could logically demand treatment under the title assigned. Rather is the discussion confined to existing and proposed legislation which tends to define the status of farmers' coöperative associations under the anti-trust laws of the United States.

Within recent years there have been numerous attempts by modification of the federal anti-trust laws to differentiate farmers' co-operative organizations from other forms of business enterprises.

Legislation to this end may be said to have had its beginning with the passage in 1914 of Section 6 of the Clayton amendment of the federal anti-trust laws. In this amendment Congress undertook to give farmers' non-stock, non-profit coöperative associations a definite and somewhat distinct position in their relation to the provisions of existing legislation.

Section 6 of the Clayton amendment provides:

> That the labor of the human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

Congress undoubtedly intended by the above provisions to permit farmers' companies to operate without regard to federal legislation prohibiting "monopolies" and without regard to the committing of acts in "restraint of trade" providing such companies were (a) composed entirely of farmers, (b) organized without capital stock, and (c) operated for the mutual benefit of their members and not for profit.[2]

Regardless of the intent there is grave question as to whether the amendment gives coöperative associations any privileges not already enjoyed before its passage. Many attorneys who have given much thought and study to the meaning of the above amendment openly confess that in the absence of a court decision they do not know what its logical interpretation should be. Others hold that under the

[1] This paper was read at the Thirty-third Annual Meeting of the American Economic Association, held in Atlantic City, December 29, 1920.

[2] A non-profit association is understood to be one which distributes the net proceeds of its operations to members in proportion to the amount of patronage which each member contributes during a specific time.

amendment the mere act of organizing for purposes of collective bargaining shall not be construed to be in violation of the federal anti-trust laws; but should such an organization restrain trade through subsequent action, it is liable to prosecution under the provisions of the anti-trust laws. In accordance with this interpretation, the farmers are free to organize for collective bargaining. The mere act of organizing shall not be construed to be in restraint of trade. But the actions of such an organization are in no wise immune from the provisions of the anti-trust law.

Although the office of the Solicitor of the United States Department of Agriculture has not attempted to give an official interpretation, it has based its instructions to the field organizers of the Bureau of Markets upon the opinion that the acts of the coöperative associations are not immune from federal anti-trust laws even though these associations be organized on a non-stock, non-profit basis.

The Federal Trade Commission seems to have taken this point of view also in its recommendations to the Department of Justice concerning the reorganization of the California Associated Raisin Company.

In this report the Federal Trade Commission states in part: "But the conduct of the Raisin Company's business should be modified, as well as its organic structure. Some of its methods have been and would, unless changed, continue to be in violation of the Clayton law even after the company is readjusted in form to the requirements of Section 6."[3]

Regardless of the intent of Congress in passing Section 6 of the Clayton amendment, it can safely be said that the amendment has tended to make the status of farmers' organizations more indefinite and more uncertain rather than clarifying their legal position.

Furthermore, the Clayton amendment has serious objections from an economic standpoint. It prescribes organizations without capital stock. This form of organization is not easily applied to all types of farmers' coöperative associations. Many states do not have laws which provide for this form of organization. Furthermore, since a large majority of existing associations are organized on a stock basis, the universal adoption of the provision of Section 6 would necessitate a reorganization of a large majority of the existing farmers' coöperative marketing companies—an almost impossible task even though it were found desirable. To many associations, reorganization would mean the termination of their existence.

Another indication that Congress favored at least partial exemption for farmers in their efforts to bargain collectively is shown by the restriction placed upon the appropriations of the Department of Justice.

[3] *Report of Federal Trade Commission to Attorney General,* dated June 8, 1920.

Beginning with the fiscal year 1914 and continuing down to date, the following provision has been inserted in the appropriation for the enforcement of the anti-trust laws: "Provided further, That no part of this appropriation shall be expended for the prosecution of producers of farm products and associations of farmers who coöperate and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products." The effect of the above provision depends largely upon the construction of the undefined term "fair price."

The next attempt to define the status of farmers' coöperative associations under the provisions of the anti-trust laws was that of total exemption. The so-called Capper-Hersman bills of the last session of the Congress are a good example of the efforts along this line.[4]

These bills proposed unmistakably to exempt farmers' organizations from the provisions of the anti-trust laws. As was to be expected, these and similar proposals expired in the hands of the committees.

The next important development along this line and one which gives more promise of success is contained in the Capper-Volstead bills,[5] which have been passed by both houses and are now (December 29, 1920) in the hands of a joint conference committee.

The provisions of this proposed legislation are substantially as follows:

1. Associations, in order to come under its provisions, shall be made up exclusively of farmers.

2. Associations shall be organized for mutual help and not for profit.

3. The Federal Trade Commission shall hold investigations if it has any reason to believe that the association restrains trade or lessens competition to such an extent that it "unduly enhances the price" of any agricultural product.

4. If after holding hearings the Federal Trade Commission shall have reason to believe that the association restrains trade or lessens competition to such an extent "that the price of agricultural product is unduly enhanced," the commission shall issue an order directing the association to cease and desist from such actions as are found objectionable.

5. If the association neglects or fails to obey the order of the Federal Trade Commission within 30 days, the commission shall refer the matter to the Attorney General for action.

It is reasonable to suppose that the above legislation, if passed without modification, will accomplish the following ends:

1. Farmers' buying and selling organizations will be relieved from

[4] H. R. 7783, 66 Cong., 1 Sess.; S. 845, 66 Cong., 1 Sess.

[5] H. R. 13931, 66 Cong., 2 Sess.; S. 4344, 66 Cong., 2 Sess.

undue and harassing litigation under the anti-trust laws by placing a scientific, investigational commission between the farmers' organization and the federal courts.

2. The legality of acts of farmers' coöperation marketing associations under the anti-trust laws shall be measured by their effect upon the public welfare rather than by the long accepted, but wholly inadequate and ineffective, standard of "competition versus monopoly."

It may be contended that the act gives farmers, through their organizations, advantages not enjoyed by other industries, hence it is class legislation. In order to pass upon this opinion it is necessary to note some of the characteristics which differentiate farming from other types of business. The ordinary business corporation is an institution for collective bargaining. By means of this form of organization individuals may associate themselves for the purpose of collectively buying, selling, and manufacturing. It is essentially a form of pooling of interests, and who can say this is not an effective means of combination. If it be a good collective bargaining institution, one may ask why do not farmers take advantage of this form of association rather than demand special legislation. Their inability to take advantage of the general corporation form of organization brings out one of the essential characteristics which differentiate farming from other industries.

The farm as a business, and the farm as a home, are part of the same unit and seemingly inseparable. Farming is a family industry. From all indications it will remain so for some time to come. Many have been the attempts to apply factory types of management and centralized control to agricultural production. It is safe to say, however, that only a small fraction of one per cent of the agricultural products grown in the United States are produced on farms which are under corporate management. American agriculture has shown little inclination to change its habits to an extent that will permit the paying of a going rate of wages for those employed in it, plus the current rate of interest on capital invested in land and equipment, and leave a surplus for the rewards of management.

Economists specializing in agricultural problems will agree that at least one fourth of the farmers of the United States receive no money compensation for their labor and managerial ability after subtracting from the total farm income the running expenses and interest at 5 per cent on land and equipment.

If farmers were to take advantage of the usual corporate form of organization it would be necessary that their farms be owned by the corporations; but since the farm is an inseparable part of the home and cannot well be operated as a separate unit, one at once sees the impracticability of such a scheme for pooling of interests. As Rep-

resentative Volstead says, "It is no answer that farmers may acquire the status and secure the rights of a business corporation by deeding their farms to a corporation. That is neither desirable nor practical from any standpoint."[6]

It must be granted that business corporations have many privileges in the way of collective bargaining which are not enjoyed by the individual or the coöperative organization.

The writer is firmly of the belief that centralization of most industrial interests tends toward substantial economies. Because of this fact legislation is ineffective to check unified action and to bring about so-called free competition. If this be the case, how shall the farmer be put on an equal footing with those with whom he deals in the sale of his products? Centralization of his marketing interests through cooperation has offered the only hope. But it has been found that cooperation will not serve the purpose if it is placed in the same legal category as the mammoth business corporation. Experience has shown that this equal treatment of unequals brings about injustice.

The large business corporation which is an appreciable influencing factor in the control of its field has little, or nothing, in common with the great majority of coöperative concerns. The coöperative form of organization is an organization of limitations. Coöperative laws as a usual thing limit the dividends, prescribe the disposition of the surplus, specify the maximum amount of stock which may be held by any one member, and dictate the manner of voting, together with the process of electing the board of directors as well as the general form of management and control. All the limitations are necessary. They are inherent characteristics of coöperation. But because of the very nature of the form of organization, the business of a coöperative company tends to be everybody's business. It is public, consequently one can readily see why it is that a coöperative organization is more liable to prosecution under the anti-trust laws than is a concern whose business transactions cannot be correctly ascertained even by the aid of grand jury proceeding.

In the writer's estimation, the above provisions, if enacted into law, would grant to farmers' marketing associations no privileges not already enjoyed by business corporations. This legislation merely tends to grant to coöperative organizations some of the privileges of the business organization. It has been likened to a handicap which has been placed on one of the participants in a race of unequals. That comparison, however, is hardly an apt illustration. Rather is it an attempt to equalize the conditions of a race in which two vastly different types of participants run over two courses which have little in common.

It would not be well to close this discussion without briefly discussing

[6] H. R. Report No. 939, 66 Cong., 2 Sess.

the probable effects of this legislation upon the welfare of the consumer. The proposal very wisely states that the coöperative organizations under its jurisdiction shall not "unduly enhance prices." They may combine or even restrain trade, for the purpose of effecting economies, but they must not arbitrarily control price.

One who is acquainted with the wide diversity of the conditions in the various agricultural sections, together with the great numbers of people engaged in the industry, has little fear of agricultural monopolies. On the other hand, if there is a possibility of monopolistic power it is to the consumer's interest that the actions of these organizations be supervised as is provided for in the bill.

It should be noted that this bill as described marks a definite recognition of supervised monopolies. It recognizes the economic truth that there are good monopolies as well as bad monopolies, the same as there is good competition as well as bad competition. Both monopoly and competition may be good or bad depending upon their effect upon the public welfare.

The bill under discussion attempts to put the farmers more nearly on a par with the corporations with which they have to deal in order that they may secure a fair price for their products. As a guarantee to other classes that a fair price is all that is desired, the bill contains provisions for the investigation of complaints which may be made against associations under this act in case these organizations seem to be exacting an unfair price.

The Volstead bill passed the House on May 31, 1920, and the Senate on December 15, 1920. The bill is now in the hands of a joint conference committee. The following "rider" which is intended to defeat the whole purpose of the bill was attached in the Senate: "Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, on account of unfair methods of competition in commerce."

There is strong reason to believe that this amendment-rider will be eliminated before the passage of the act. If it should stand, however, coöperative organizations will have the same legal status under the federal anti-trust laws as was the case before the enactment of the Clayton amendment. An exception to this is that the pending legislation, with the above amendment, creates machinery for more rigid supervision and for closer investigation of coöperative actions—a proposal to treat a serious burn with more fire.

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